United States Court of Appeals

for the Second Circuit

APPELLANT'S BRIEF

ORIGINAL 74-1217

United States Court of Appeals

For the Second Circuit

THE UNITED STATES OF AMERICA,

Appellee,

vs.

SAUL M. KOHN,

Defendant-Appellant.

APPELLANT'S BRIEF

On Appeal From The United States District Court For The Eastern District Of New York

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UNITED STATES OF AMERICA,

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-against-

Docket No.74-1217

SAUL M. KOHN,

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BRIEF FOR APPELLANT

Preliminary Statement

Saul M. Kohn appeals from an order which denied an application to suppress certain evidence. Said order was made and entered in the United States District Court for the Eastern District of New York on June 26,1973 by the Hon. Mark A. Costantino after a hearing.

By a superseding indictment, containing four counts, Kohn was charged with the knowing importation of hashish in violation of Title 21, United States Code, Sec.952 (a) and 960 (a) (1) and Title 18, United States Code, Sec.2.

Count 2 charged him with violating Title 21, United States Code, Sec 955 and Sec.960 (a) (2) and Title 18. United States Code, Sec2, possessing a controlled substance on board an aircraft, said substance not being part of cargo entered on the manifest etc.

Count 3 charged him with the possession with the

intent to distribute a quantity of hashish in violation of Title 21,United States Code,Sec.841 (a) (1).

Count 4 charged him witha cons!iracy to import into the United States a quantity of hashish in violation of Title 21,United States Code,Sec.952 (a). Title 21, United States Code Sec.5963.

The indictmen was filed on April 10,1973.

The appellant was acquitted of all charges except those under Count 3.

The appellant was sentenced on February 1,1974 to serve a term of three years of which two and one half years was suspended.He was placed on probation for the suspended portion and was ordered to serve a term of five years on special parole. The sentence was stayed pending the determination of this appeal.

Trevor A. Walters, a British national, arrived at Kennedy Airport via an Iberian Air Lines Flight on February 8,1973.(6,8,84,Gov. Ex. 1,2,4)* Two days previously, in Tangiers, he had been given suitcases containing hashish and a slip of paper with the defendant's name address and telephone by a "Michael". He was instructed to contact the appellant on his arrival in New York City. (8,9,11,12 24, Gov. Ex.3)

A custom's search of Walter's luggage was triggered by the aroma of freshly applied glue. Hashish was uncovered. Arrest and interrogation followed culminating in Walter's agreement to cooperate with the authorities. (20-21,39,Gov. Ex 3) He admitted that he was a paid courier, deputized to smuggle "hash" into the United States.(17-18)

At the behest of Federal agents who had cococted a plan to ensnare the appellant, he made a call toKohn's home.(21,22,84,105). This call was recorded.** (85) Walters and Kohn "were not friends" but had met fleetingly in Europe approximately two years before.(24,25-26) Walters had been programmed by the agents. He was ordered to effect a meeting with Kohn at his home and leave the "hash" there.(48,51,82) For his efforts, Walters was promised "a break from the government".(28)

.....

*Refers to pages in the hearing transcript. The trial record resembles the suppression minutes.

** The taped conversation is not referred to. Candor demands the admission that sufficient cause existed for Kohn's arrest

Armed with his contraband laden valise, Walter's was driven to his rendezvous with Kohn. He was invited into the apartment and after exchanging the usual amenities, the discussion centered on Kohn's ability to dispose of the hashish. After five or tenminutes, Walters left, leaving the bag with Kohn. Departure was effected by traversing a foyer of approximately twelve feet in length that connected the living room with the exit. The living room was not visible from the entrance. (45, 46,47)

Agent Robert Czujak, together with Agent Grieco had accompanied Walters' to the Kohn abode.(63,86,105) Grieco had observed Walters' entry and his departure. Ten minutes later, a raiding party of five agents, entered after Agent Walsh had knocked and identified himself to the defendant. (75,87,115)Walsh never announced his purpose.* At the threshhold Walsh advised Kohn of his "Miranda rights", adding a most confusing "right" - that Kohn could answer questions with or without the presence of an attorney.** (63,63a,88)

.....

* This defect (see 18 U.S.C. 3109) was discussed and found harmless in United States v Manning,448 F2d at 997-1002 See also Sabbath v United States, 391 U.S. 585,588(1968)

** Agent Czujak differed with Walsh. He testified that the Miranda warning was given Kohn in the living room. He also described Kohn's tirade and significantly attributed a consent to search to Kohn's "I don't care what you do, just do what you have to do". This after an inquiry as to the presence of a search warrant and a refusal to divulge the location of the valise.It is suggested that the threat of a post-arrest search warrant extorted this "consent". (88,89,90,102,115

No guns were drawn. Apparently the agents did not feel threatened.

After traversing the length of the foyer, the agents entered the living room, and, in open view, on a table, they saw a small amount of "hash" and some pipes. Apparently Kohn had been self indulgent.(64,95)

This was Kohn's first exposure to the rigors of an arrest. A tirade followed,running the gamut from hedonism to privacy. Ultimately he was calmed. Interrogation failed to discover the location of the Walters' valise. Kohn asked if the agents had a search warrant.(89,90) Grieco said no. Kohn was then told that if he insisted upon the letter of the law, a statement not without a degree of humor, the apartment would be secured, an agent left in residence and a warrant obtained to be followed by a search on the morrow. (90,102,115,116) After more discussion, a search ensued.Kohn had divulged the location of the sought after luggage.(65,90) Two empty holsters, a brick of marijuana and a scale were also found.(92,94)

At Custom's headquarters, the appellant, apparently aroused. disclosed an exotic occupation - marijuana salesman. (96)This was repeated to a secretary in the office of the United States Attorney.(96a) Before the arraigning magistrate Kohn repeated this nonsense.(98)

The Court held that Kohn's statments to the agents were constitutionally valid but all others were tainted.

The Court ruled that the bag, laden with hashish, had been seized validly as had the hashish in open view on the living room table.(122,123) Consent was the predicate. Suppression was granted as to the scale and the brick of marijuana.

POINT I

THE SUPPRESSION MOTION SHOULD HAVE BEEN GRANTED.

"Few areas of the law have been as subject to shifting constitutional standards over the last 50 years as that of the search ' incident to an arrest'" Chimel v California, 395 U.S. 752,770 (1969) Generally there comes into focus basic questions concerning the permissible scope under the Fourth Amendment of such searches which symbolize the eternal conflict between the citizen and the police.

Like many before it, this case raises issues stemming from a planned warrantless search; (80,81,88) of a search that exceeds the strictures imposed by Chimel (supra) and of a search commencing in an excess and culminating in a convenient consent.

Trevor Walters, a willing actor in a drama, written, produced and directed by the government,in circumstances that were less than exigent, delivered a quantity of hashish to Kohn, while enveloped in a cocoon of surveilling agents.After gaining entree, he left the contraband with Kohn.

A knock on a door, the showing of an official badge, the rote-like litany of the Mirandawarning, and the arrest of Kohn at the threshhold of his apartment presaged an eventual search for that which the agents knew was present.(63,72,111) The operation was casual. No guns were drawn. Danger was absent. (63, 88) Six hours had elapsed since Walters had been arrested, sufficient time within which to obtain a search warrant. (66,67,71) The appellant, surrounded by agents, was marched the length of a long foyer into a living room.(73,112) The contents in the living room could not be seen from the threshhold. (112) Kohn inquired whether the agents possessed a search warrant.(114) He was told that the apartment would be secured, an agent left in residence, a warrant obtained and a search would occur the following day.(116)

A.

UNDER THE CIRCUMSTANCES
THE AGENTS SHOULD HAVE
OBTAINED A SEARCH WARRANT.

The threshhold question is whether the agents, under these circumstances, were required to obtain a search warrant. Coolidge v New Hampshire,403 U.S. 443, teaches that where ample opportunity exists to obtain a search warrant and "the intention to seize the evidence is really the prime motivation for the arrest, the plain view exception does not apply". United States

v Liszenyai, 470 F2d 707,710 (2d Cir. 1972)cert. den. 410 U.S. 487 (1973). See also United States v Santana, 485 F2d 365,369-70 and n.8 (2d Cir. 1973) While this arrest was not pretextual, it is indeed apparent that the agents, at the outset, knew or should have known, that predetermined inevitability decreed a warrantless search.They elected to gamble. Wherever practicable, the police must obtain advance judicial sanction for the inevitable search. Terry v Ohio, 392 U.S. 1 (1968) A burden is placed upon the government to justify the warrantless search. United States v Jeffers,342 U.S. 48,51 (1968)

Two questions propounded to the witness Czujak during cross examination, the latter overruled by the court, might have thrown light upon this. " Was there ample opportunity for you gentlemen to acquire a search warrant....." and "Was the situation here of an exigent nature? " (107,108) As to the former the witness' answer was less than an answer.

A most charitable and favorable view reveals circumstances that are less than emergent. Six hours had elapsed between Walters' arrest and that of the defendant. The agents knew that relative strangers would meet at the Kohn apartment. Every indication pointed to success of Walters' mission. Kohn had swallowed the bait. (T.M. 150-151, 6/29/73). There was cause and opportunity to acquire a search warrant.*

See Mr. Justice Douglas' dissent in United States v Matlock , No. 72-1355, 14 Cr L 3108, 3112-3115, dec. February 20,1974. citing Johnson v United States,333 U.S. 10 (1948); Trupiano v United States, 334 U.S.699 (1948); McDonald v United States, 335 U.S. 451 (1948); Jones v United States,357 U.S.493(1958; Coolidge v New Hampshire, (infra)

The agents were bent on a search, knowing that Walters would accomplish his mission.With a little effort and a little time, a magistrate's judgment could have been sought and a search warrant obtained. The taint attached at the inception.

B.

THE SEARCH VIOLATED THE STRICTURES OF CHIMEL.

If the threshhold question is resolved against the defendant, the government faces another hurdle - Did the subsequent search violate the rule of Chimel v California, 395 U.S. 752 (1969)? A warrantless search occuring in fixed premises is not a license for a general search. It is not on a par with one having the sanction of a warrant. Its justification rests on the protection of the officer and the safeguarding of evidence on the arrestee's person or the area in which he is capable of reaching.

.....

* In United States v Kiffer et al,477 F2d 349 (1973) a search warrant was obtained while the agents were in the field and prior to the arrest of Harmash and Kehoe. This warrant was not used.

The situs of the arrest, in Chimel terms, was distant from the place where the search and seizures occurred. Kohn walked or was shoved a distance of ten or twelve feet, all to the accompaniment of preponderant authority. In the living room, on a table, in open view, lay some hashish. This is not the situation found in United States v Artieri et ano, Sl. Op., January 23,1974 (2d Cir.) It is not a situation sanctioned by Chimel (infra) * In Artieri (supra) the agents, while seeking the defendants to arrest them, found their prey together with the contraband.

Here nothing was found at the situs of the arrest. A trespass-like entry uncovered, advertently that which was not in "open view" originally. If Chimel is to have meaning it should be construed as a road block precluding not only a general search but a physical intrusion into other areas of a private residence.

.....

* "When an arrest is made it is reasonable for the arresting officer to search the person arrested in order to remove any weapons that the latter might seek to use in order to resist arrest or effect his escape... In addition it is entirely reasonable for the arresting officer to search for and seize any evidence on the arrestee's person in order to prevent its concealment or destruction. And the area into which an arrestee might reach in order to grab a weapon or evidentiary items must, of course, be governed by like rule." Chimel, (infra, at p. 763.)

Implicit in this trespass-like penetration is a search, a search that occurs as the agents move. Had the agents seized evidence at the threshhold, that seizure would have been legal.The subsequent seizures in the living room are not transmuted into lawful seizures because the intial arrest has validity.* This is the obverse of United States v Holmes, 452 F2d 249,259 (7 Cir.1971) and United States v Lee,274 U.S. 559 (1927)

In United States v Mapp, 476 F2d 67 (2d Cir.1973) a search and seizure was struck down in reliance on Chimel. The similarities between Kohn and Mapp are evident. Kohn, unarmed, surrounded by five or six armed agents, was under arrest and impotent.He posed no threat to either the agents or the evidence sought. The agents simply could not bear the frustration of the constitutional barrier presented by Chimel.

.....

* 'The record in this case reveals that the closet in which the heroin packages were found was closed at the time of the search. Thus, the only justification for the search, absent a warrant, is that the closet was within the area of Mrs. Walter's "immediate control", within the meaning of Chimel. Officer Crowe testified, however,that he was standing between Mrs. Walters and the closet at the time the he asked for the package which Mapp had left earlier. At the time the demand was made, there were five or six officers in the one bedroom apartment certainly more than sufficient manpower to prevent Mrs. Walters from reaching the closet. .... To say that the closet was an area into which she was able to reach, despite the fact that an armed officer stood between her and it,would, in effect,be to hold that a search of all the enclosed places in Mrs. Walter's bedroom would have been consistent with the Fourth Amendment - a result explicitly foreclosed by Chimel". (Mapp, Supra)

-C-

KOHN'S CONSENT WAS NOT FREELY GIVEN.

The Court below was satisfied that Kohn's consent was freely and voluntarily given and that the government sustained its heavy burden. United States v Gaines, 441 F2d 1122,1123 (2d Cir. 1971): Gorman v United States, 380 F2d 158,163 (1st Cir.1967); Bumper v North Carolina, 391 U.S. 543 548 (1968); Schneckloth v Bustamonte, 412 U.S. 218 (1973)

The appellant was in custody. This fact alone does not negate the possibility of a voluntary consent. However when coupled with other facts the conclusion that the appellant voluntarily consented becomes less inexorable.

The trial court agreed that the words used by Kohn "may appear equivocal". (Opinion) but their meaning "at the time was crystal clear to all present". (Opinion) The Court cannot argue both ways. Consent doe s not rest in the eyes of the beholder. The totality of the circumstances when pieced together must clearly establish that a constitutional right has been surrendered. (Schneckloth infra) Whether this has occurred is for the court without resort to the thoughts of those present.

Kohn, surrounded as he was by a gaggle of agents, whose over-powering presence lent towards submission, became agitated and hysterical. He became distraught and his outbursts were examples of a distraught mind, incapable of measured thought.

His reflexive demand for a search warrant is the story book material of a school child. This is Hollywood compounded by Television. His ultimate "consent" is simply abject surrender.

The agents knew that Kohn had concealed the hashish. They knew it was in the apartment. They were not about to leave. Their purpose was obvious - find the valise. They were not going to permit Kohn to engage in constitutional lunacy.The court below rewarded official indolence. It also permitted a violation of Chimel to be cured by a retroactive "ratification" by an hysterical appellant.

CONCLUSION

THE JUDGMENT SHOULD BE REVERSED AND THE INDICTMENT DISMISSED.

Respectfully submitted,

AARON SCHACHER
Attorney for the Appellant.

AFFIDAVIT OF PERSONAL SERVICE

STATE OF NEW YORK,
COUNTY OF RICHMOND ss.:

EDWARD BAILEY being duly sworn, deposes and says, that deponent is not a party to the action, is over 18 years of age and resides at 286 Richmond Avenue, Staten Island, N.Y. 10302. That on the 25 day of MARCH, 1977 at No. 225 CADMAN PLAZA EAST deponent served the within BRIEF upon U.S. ATTY EASTERN DIST. OF N.Y. the APPELLEE herein, by delivering a true copy thereof to him personally. Deponent knew the person so served to be the person mentioned and described in said papers as the Appellee therein.

Sworn to before me,
this 25 day of March 1977

Edward Bailey

Edward Bailey

William Bailey

WILLIAM BAILEY
Notary Public, State of New York
No. 43-0132945
Qualified in Richmond County
Commission Expires March 30, 1978